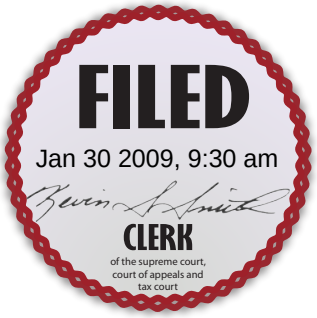

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IN THE COURT OF APPEALS OF INDIANA

TRAVIS J. HOUSE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 35A05-0806-CR-358
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HUNTINGTON CIRCUIT COURT
The Honorable Thomas M. Hakes, Judge
Cause No. 35C01-0705-FA-29

January 30, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Travis House was convicted of molesting his daughter, E.H., as a Class A felony[1] and as a Class C felony.[2] House raises nine issues, which we consolidate and restate as: (1) whether the trial court erred by admitting his statements from an interview with the prosecutor's investigator and a detective; (2) whether the trial court abused its discretion by finding E.H. a competent witness; (3) whether the trial court abused its discretion by excluding portions of testimony by House's mother; (4) whether the evidence was sufficient to support his convictions; (5) whether the trial court should have given four instructions tendered by House; and (6) whether his sentence is inappropriate. We affirm.

FACTS AND PROCEDURAL HISTORY

House had been married to Tamara Rhoderick, and E.H. is their child. When E.H. was six and seven, she lived with Rhoderick in Indianapolis and visited House in Huntington every other weekend. Rhoderick reported to Marion County Child Protective Services that House was molesting E.H., and visitation ceased. E.H. was interviewed in Indianapolis, and she described molestations occurring at House's home and in his truck. House had been a truck driver, and E.H. had travelled with him alone on at least one occasion. An investigation was initiated in Huntington, and the FBI began investigating whether House had molested E.H. outside of Indiana.

Ron Hochstetler, an investigator for the Huntington County Prosecutor's Office, went to House's home on April 3, 2007. House's wife, Susan, was the only person home, and Hochstetler told her that he wanted her and House to come in for an interview.

[1] Ind. Code § 35-42-4-3(a)(1).
[2] Ind. Code § 35-42-4-3(b).

On April 10, 2007, House and Susan went to the prosecutor's office for interviews. The prosecutor's office is in the courthouse, but they did not have to go through security to enter the courthouse or the prosecutor's office. Susan was interviewed first. Hochstetler was the lead interviewer, and Detective Mel Hunnicutt assisted. Susan's interview lasted approximately one hour, and during that time, House was in a waiting room accessible to the public. Then Susan waited in the waiting room while House was interviewed.

When House entered Hochstetler's office, Hochstetler asked him to set his briefcase "away from him on the other side of my desk." (Tr. at 49.) Hochstetler began the interview by asking for "identifiers," such as his address, phone number, birth date, employment, and family members. (Interview Tr. at 81.) Hochstetler then explained:

> Travis I'm going to read to you your Miranda warning which is your right for counsel um, it's very important that you understand this. I also want you to know that you are not in custody right now. You are not under arrest. The door is right there. You can hit it any time you want to. If you do decide to stay and talk with us and take advantage of what we have to offer you today, you have to know, you have to understand that it's because Travis House wants to do it. No one is going to force you up here today to do anything. We're going to make some options open. If you decide to take one of the options it's because you want to do it.

(*Id*. at 86.) Hochstetler read the *Miranda* warning, and House indicated he understood it and was willing to answer questions. House read aloud and signed a waiver of rights.

Hochstetler informed House the FBI was also investigating him. Hochstetler explained:

> What I had planned and had hoped to offer you today is to join a counseling session and have an assessment done so that we can find out, so that Susan can find out if what happened with [E.H.] was just a one time thing or did it

> happen more often than that. Are you at risk with [J.H.[3]], are you at risk with other kids who live there on Bryant Street, are you the kind of guy who when you get off work at Ecolab, you're out here driving around looking for little children? I don't know Travis, I don't know who you are but this counseling service has a sex offenders program and I told Susan that I'm going to offer that to you today. The agent from the FBI has agreed to go along with this idea. He's going to hold off on his federal investigation to see what your attitude is here today.

(*Id*. at 98.)

House said E.H. had dry skin, and he rubbed lotion all over E.H.'s body, including in the area of her vagina:

> Investigator Hochstetler: Did you rub her vagina?
> Travis House: Yeah, the, yeah, I didn't put lotion in her but all over her body. She had a little dry skin marks all over her and I, it's all I done.
> * * * * *
> Investigator Hochstetler: And so you put lotion . . . on her body between her legs, rubbed her vagina?
> Travis House: Yes I did. Uh, it was head to toe, on the forehead . . .

(*Id*. at 103.)

House claimed Susan was aware of this. Hochstetler told House that E.H. had given more detail and asked, "Did you sexually touch your daughter?" (*Id*. at 112.) House said, "Yes." (*Id*.) However, House retreated from that statement, saying, "what I construe as sexual . . . is anything that [has] to do with the genitals. Yes, I have touched her there." (*Id*. at 115.) Hochstetler then left the room to ask Susan about the lotion incident, and Detective Hunnicutt continued the interview with House. When Hochstetler returned, he said Susan denied knowing about House putting lotion on E.H.'s full body, and "she even said why would anybody rub lotion between a little girl['s] legs,

[3] J.H. is the daughter of Travis and Susan House.

she said that would irritate it and . . . she said [E.H.] didn't have dry skin between her legs." (*Id*. at 134.)

Hochstetler then encouraged House to get help from a counselor:

> Investigator Hochstetler: . . . There will come a day when you're going to be walking in to that jail cell or Pendleton or wherever and that big iron door is going to . . . close and you're gonna . . . sit there and say guys come on, . . . can you help me out here a little bit? Or at sentencing . . . you're gonna be asking someone come on give me a break . . . I'm not a bad person. May not be but the judge is going to look down at you and say but . . . on April 10th, 2007, didn't those guys offer you a chance to take care of this? Why didn't you do it then? Well because . . .
>
> Travis House: And I'm willing to take that chance, I, you know I, I guess, I guess I need to call my attorney because I don't know what to say.
>
> Investigator Hochstetler: I'm only asking you for the truth.

(*Id*. at 137.)

The interview continued, with Hochstetler telling House why he did not believe his story. Hochstetler asked, "Did you do those other touches in the truck that she talks about, yes or no?" (*Id*. at 139.) House asked, "May I call my attorney real quick?" (*Id*.) Hochstetler responded, "You can . . . leave here because we're finished Travis. You . . . don't have to talk with me. You're not under arrest." (*Id*.) House continued the conversation, saying, "I want the best for my daughter." (*Id*.) House repeated his account of the lotion incident and admitted, "I did rub between her labia." (*Id*. at 148.) However, House denied any touching was for his gratification.

Hochstetler stated he was going to talk to the prosecutor about whether he could arrest House without a warrant. When Hochstetler left the room, House initiated conversation with Detective Hunnicutt, and he admitted he had rubbed E.H.'s genitals on multiple occasions, including her clitoris. He also talked about a time he was "wrestling

around" with E.H. and got an erection. (*Id*. at 189.) He said there were times he would grab her bottom or "pick her up by it." (*Id*. at 192.) Detective Hunnicutt asked him if he did that to gratify himself sexually, and House said, "Yeah." (*Id*. at 193.) House said touching her bottom gave him "a high" or "an elated feeling." (*Id*. at 194.)

After Hochstetler returned to the room, House said E.H. was "telling the truth." (*Id*. at 201.) Detective Hunnicutt asked for more details, and House said, "I do have a tendency to give a lot of massages and I, I've given [E.H.] massages, you know rub her shoulders, down her back, the top of her butt, and (inaudible) legs." (*Id*. at 206.) He again said he got an "elated feeling" when he touched her bottom. (*Id*.)

At the conclusion of the interview, Hochstetler told House that the prosecutor did not want him to make an arrest at that time, but wanted House to see the counselor. House agreed that he would. Hochstetler instructed House to let him know when he had scheduled an appointment with the counselor. House was not arrested that day, and he subsequently had one appointment with the counselor.

On May 10, 2007, House was charged with child molesting as a Class A felony and as a Class C felony. House filed a motion to suppress his statements from the interview, which was denied. A jury trial was held on March 4 and 5, 2008.

At trial, Hochstetler testified about the process used to interview E.H., Susan, and House. Detective Hunnicutt testified House had been asked whether he touched E.H. sexually, and House told them about rubbing lotion all over E.H.'s body, including her labia and clitoris. Detective Hunnicutt also testified House said he gave E.H. massages

that included touching her bottom and that he got "an elated feeling" or a "high" from touching her bottom. (Tr. at 391.)

Rhoderick testified E.H. had dermatitis on the backs of her hands and on her shins and that she had sent lotion along with E.H. for that condition. She testified E.H. had been examined by Dr. Karen West in November 2006. E.H.'s hymen had not been ruptured, but there was an irritation in her genital area. Dr. West could not state conclusively that the irritation was caused by abuse, but she considered it "suspect." (*Id.* at 309.)

House's mother, Sandy House, testified she was often present when House had visitation with E.H. She said Rhoderick would send medicated lotion along. Sandy testified E.H. "had dry skin, some of it looked psoriatic," and it was "splotchy all over." (*Id.* at 409.) Sandy said she had applied the lotion to E.H. on some occasions. When asked where on E.H.'s body she applied the lotion, Sandy said, "I just covered all the bases." (*Id.*) She did not put lotion on E.H.'s labia or clitoris.

E.H. testified House took off her clothes and rubbed her "private." (*Id.* at 324.) She testified "you pee . . . from your private." (*Id.* at 321.) The prosecutor asked her if House ever touched her on the inside of her private, and she said, "Kinda." (*Id.* at 325.) The prosecutor then asked her if House touched "the top part of your private, the middle part of your private or where?" (*Id.*) She responded that he had touched the middle part. She also testified House touched her "private with his private." (*Id.*) She said he "[j]ust swished it back and forth." (*Id.*) She testified he also "swished" his penis "back and forth" on her bottom. (*Id.* at 326.) She said he was undressed when he touched her with

his penis. She also said there was a time when they were both undressed and House kissed the inside of her legs.

The jury found House guilty of both charges. The trial court sentenced House to forty years on the Class A felony, to be served consecutive to five years on the Class C felony.

DISCUSSION AND DECISION

1. Admission of Statements from Interview

The State bears the burden of proving beyond a reasonable doubt a defendant's statements were voluntarily given. *Miller v. State*, 770 N.E.2d 763, 767 (Ind. 2002). "Our standard of review of rulings on the admissibility of evidence is effectively the same whether the challenge is made by a pre-trial motion to suppress or by a trial objection." *Burkes v. State*, 842 N.E.2d 426, 429 (Ind. Ct. App. 2006), *trans. denied* 855 N.E.2d 1006 (Ind. 2006). We do not reweigh the evidence, but examine the record for substantial evidence of probative value to support the trial court's decision. *Miller*, 770 N.E.2d at 767. "We consider the evidence most favorable to the court's decision and any uncontradicted evidence to the contrary." *Burkes*, 842 N.E.2d at 429.

We consider first whether House's statements were obtained in violation of *Miranda*.

> In *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966), the U.S. Supreme Court held that when law enforcement officers question a person who has been "taken into custody or otherwise deprived of his freedom of action in any significant way," the person must first "be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *See*

> *also Stansbury v. California*, 511 U.S. 318, 322, 114 S. Ct. 1526, 128 L.Ed.2d 293 (1994).
>
> When determining whether a person was in custody or deprived of his freedom, "the ultimate inquiry is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *California v. Beheler*, 463 U.S. 1121, 1125, 103 S. Ct. 3517, 77 L.Ed.2d 1275 (1983); *see also Stansbury*, 511 U.S. at 322, 114 S. Ct. 1526. We have held this is determined by examining whether a reasonable person in similar circumstances would believe he is not free to leave. *Cliver v. State*, 666 N.E.2d 59, 66 (Ind.1996).

Luna v. State, 788 N.E.2d 832, 833 (Ind. 2003).

House argues there are three facts that would indicate to a reasonable person he was in custody: (1) the room where he was interviewed was locked; (2) he was not allowed to keep his briefcase or answer his phone; and (3) the interview continued after he denied the allegations. We disagree.

At the suppression hearing, Hochstetler testified the door was locked so that a person on the outside could not get in, but a person inside the room could get out without unlocking the door. House testified at the hearing, but he did not state he believed he was locked in the room. At the beginning of the interview, Hochstetler told House, "I'm just going to have you put your briefcase over here for just a minute . . . not because I don't trust you with it but I don't know you. . . . [I]t's just safer having it out of your . . . reach." (Interview Tr. at 78.) Thus, Hochstetler explained that he was asking House to set aside his briefcase as a safety precaution. At one point during the interview, House's cell phone rang, and Hochstetler said, "Turn that thing off . . . or shit can it or something." (*Id*. at 112-13.) While this might indicate to House that his freedom was being restrained, the statement is also consistent with annoyance at an interruption.

Finally, the fact that the interview continued after House denied the allegations may indicate the environment was coercive, but it does not mean he was in custody. *See Luna*, 788 N.E.2d at 834 (Luna was not in custody despite "Detective Rosen's request that Luna drive to the police station, the security of the office in the police station, Luna's initial denial, and Detective Rosen's insistence on Luna telling the truth and implying that Luna was lying.").

The facts in this case are similar to those in *Luna*. A ten-year-old girl accused Luna of touching her privates with his hands and mouth. Detective Rosen located Luna at work and asked him to come to the police station to tell his side of the story. Luna agreed and drove himself to the police station. Detective Rosen told Luna he was not under arrest, did not have to talk to the police, and was free to leave at any time. Detectives Rosen and Davidson interviewed Luna in their office, which required a code to enter but not to leave. When Luna denied the allegations, Detective Rosen told him he thought he was lying and wanted him to tell the truth. Luna then admitted the allegations. Detective Rosen again told Luna he was not under arrest, he could leave at any time, and he did not have to answer questions. Luna gave a taped confession, and then left the station. Our Indiana Supreme Court held Luna was not in custody, because he

> was repeatedly told that he was not under arrest, that he was free to leave, and that he did not have to talk to the police officers. In fact, Luna drove to the police station himself, and after confessing to the crime, was allowed to leave the station on his own.

Id.

In *Luna*, our Indiana Supreme Court relied on *Oregon v. Mathiason*, 429 U.S. 492 (1977). Mathiason was a suspect in a burglary. The officer investigating the burglary left a note at Mathiason's apartment asking him to call because the officer had something to discuss with him. Mathiason called the officer and agreed to meet him at the state patrol office. The officer told him he was a suspect in a burglary, but was not under arrest. Mathiason admitted taking the stolen property. The officer then advised Mathiason of his *Miranda* rights and took a taped confession. At the end of the statement, the officer allowed Mathiason to leave. Mathiason was not in custody. *Id*. at 495; *see also California v. Beheler*, 463 U.S. 1121 (1983) (holding Beheler was not in custody because he voluntarily came to police station, was told he was not under arrest, and was permitted to leave after his interview).

Hochstetler went to House's home on April 3, 2007, where he talked to Susan and requested an interview with her and House. House and Susan voluntarily came to the prosecutor's office a week later. They did not have to pass through security. House waited in a public waiting room while Susan was interviewed. After informing House he was being investigated and obtaining some identifying information, Hochstetler informed House he was not under arrest and could leave at any time. He told House he had a right to remain silent and had the right to stop answering questions at any time. Twice during the interview, House was reminded that he was not under arrest and did not have to talk to Hochstetler and Detective Hunnicutt. At the conclusion of the interview, House was not placed under arrest, but was permitted to leave. Hochstetler did not seek a warrant until several weeks later.

Given the similarity of House's case to *Beheler*, *Mathiason*, and *Luna*, we conclude House was not in custody. Because *Miranda* warnings were not required in the first instance, we do not reach House's argument under *Edwards v. Arizona*, 451 U.S. 477 (1981), *reh'g denied* 452 U.S. 973 (1981), which holds custodial interrogation must cease when the accused requests an attorney. *See McNeil v. Wisconsin*, 501 U.S. 171, 178 (1991) (*Edwards* applies only when defendant expresses "his wish for the particular sort of lawyerly assistance that is the subject of *Miranda*," that is, "a desire for the assistance of an attorney *in dealing with custodial interrogation by the police*") (emphasis in original); *Michigan v. Harvey*, 494 U.S. 344, 350 (1990) (*Edwards* "added a second layer of protection to the *Miranda* rules," thus establishing "another prophylactic rule designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights."); *Joyner v. State*, 736 N.E.2d 232, 241-42 (Ind. 2000) (although Joyner had been given *Miranda* warnings, he was not in custody, and the Court declined to apply *Edwards*). Although the prophylactic *Edwards* rule does not apply, we will consider House's mention of an attorney to the extent it reflects on the voluntariness of his statements.

House argues his statements were not made voluntarily.

> The admissibility of an incriminating statement is not determined solely by application of the *Miranda* rules. Where, as here, the defendant was not in custody, an admission may be excluded because it was made involuntarily. The Fourteenth Amendment to the United States Constitution incorporates the Fifth Amendment privilege against self-incrimination. Therefore, to be admissible consistent with these provisions, a suspect's statement must be voluntarily given. A confession is voluntary if, in light of the totality of the circumstances, the confession is the product of a rational intellect and not the result of physical abuse, psychological intimidation, or deceptive

> interrogation tactics that have overcome the defendant's free will. The critical inquiry is whether the defendant's statements were induced by violence, threats, promises, or other improper influence. Stated differently, "the relevant inquiry is whether the challenged police conduct induced a confession which was not freely self-determined."

Brabandt v. State, 797 N.E.2d 855, 863 (Ind. Ct. App. 2003) (citations omitted).

House notes he was working third shift – 11:00 p.m. to 7:00 a.m. – and the interview occurred in the morning, when he would normally be sleeping. He argues he was sleep-deprived at the time of the interview. *See Scalissi v. State*, 759 N.E.2d 618, 621 (Ind. 2001) (lack of sleep a factor in determining voluntariness of statements). The only evidence House was sleep-deprived was his statement during the interview, "I'm in a complete fog." (Interview Tr. at 157.) However, it is not apparent whether that statement indicated he was tired or whether it was merely an evasive answer. At the suppression hearing, House did not testify that he was tired, was having trouble thinking clearly, or that his will was weakened in any way by his physical condition.

House characterizes Hochstetler's statements about the FBI investigation as deceptive. However, the record does not reflect that Hochstetler said anything that was untrue. At the suppression hearing, Hochstetler testified he had ongoing contact with Agent Mark McCormick and Assistant United States Attorney Anthony Geller, who were investigating House. They knew Hochstetler had arranged to interview House, and they had discussed "possible outcomes depending upon [the] interview with Mr. House." (Tr. at 52.) Hochstetler testified it was his understanding that the FBI suspended its investigation because the State was pursuing charges. In isolation, some of Hochstetler's statements to House could imply Hochstetler could control whether the federal

investigation continued. However, Hochstetler explained early in the interview that he wanted House to see a counselor, and the "FBI has agreed to go along with this idea." (Interview Tr. at 98.) The record as a whole indicates House was informed the FBI had suspended its investigation by its own choice.

House also characterizes as deceptive the counseling option offered by Hochstetler and Detective Hunnicutt. Near the beginning of the interview, Hochstetler stated:

> What I had planned and had hoped to offer you today is to join a counseling session and have an assessment done so that we can find out, so that Susan can find out if what happened with [E.H.] was just a one time thing or did it happen more often than that . . . .

(*Id*. at 98.) He further stated:

> I'm offering you a chance to find out about that [sexual behavior] problem. Not just for you but for us because I'm going to be honest with you, this assessment helps both sides. It helps us because we're going to know all about you, because I told you up front right now you're the most dangerous person that I know of because I don't know what you're capable of doing . . . .

(*Id*. at 109.) Hochstetler explained that if House enrolled in the counseling program,

> Ed [the counselor] then becomes an advocate for you because . . . if you start going through his program and he sees that you're treatable . . . and if he's convinced this was a one time thing with your daughter, you're not at risk, he comes back and reports that to us and that makes a big difference on how we handle our case from there because now we're starting to know more about you.

(*Id*. at 122-23.)

Hochstetler did not promise House that charges would not be filed if he enrolled in the counseling program. At most, he implied less serious charges would be filed if the counselor determined House posed a low level of risk to society. House indicated he

would pursue counseling. When Hochstetler determined House had attended only one counseling session, he contacted House to see if he was planning to continue counseling. House told Hochstetler that he would continue with counseling, but he did not. Only then were charges filed. To the extent House argues he was promised leniency if he obtained an assessment that showed he was not a serious risk to society, he has not cited any evidence that his counseling session resulted in such an assessment.

House also argues he was denied the opportunity to confer with a lawyer. House's first mention of an attorney was, "I, you know I, I guess, I guess I need to call my attorney because I don't know what to say." (*Id*. at 137.) This statement was not a clear request for an attorney or invocation of his right to remain silent. *See Taylor v. State*, 689 N.E.2d 699, 703 (Ind. 1997) (Taylor's statement, "I guess I really want a lawyer, but, I mean, I've never done this before so I don't know," not sufficiently clear to constitute invocation of Fifth Amendment right to counsel). A little later in the interview, House asked, "May I call my attorney real quick?" (*Id*. at 139.) Hochstetler responded, "You can, you can leave here because we're finished Travis. You, you don't have to talk with me. You're not under arrest." (*Id*.) Rather than leaving or calling his attorney, House continued to converse with Hochstetler and Detective Hunnicutt.

House came voluntarily to the prosecutor's office. He was told he was not under arrest, did not have to answer questions, could stop answering questions at any time, and could leave at any time. He was not arrested at the conclusion of the interview. At the suppression hearing, Hochstetler testified House appeared to be "intelligent" and did not appear to have any physical or medical problems. (Tr. at 49.) House appeared to have

the maturity of a man his age. Hochstetler believed House was educated because he had been able to obtain a CDL license and was able to read the waiver of rights form. Looking at the totality of the circumstances without reweighing the evidence, we conclude the trial court did not err by determining House's statements were voluntary and admissible.

2. Competency of E.H.

Pursuant to Ind. Evidence Rule 601, every person is presumed competent to be a witness. When a child witness is challenged, competency can be established by demonstrating the child (1) understands the difference between telling a lie and telling the truth; (2) knows he or she is under a compulsion to tell the truth; and (3) knows what a true statement is. *Kien v. State*, 866 N.E.2d 377, 385 (Ind. Ct. App. 2007), *trans. denied* 878 N.E.2d 207 (Ind. 2007). "To be qualified to testify, a child need not be a model witness, have an infallible memory, or refrain from making inconsistent statements." *Casselman v. State*, 582 N.E.2d 432, 435 (Ind. Ct. App. 1991). The determination of a witness's competency is reviewable only for abuse of discretion. *Aldridge v. State*, 779 N.E.2d 607, 609 (Ind. Ct. App. 2002), *trans. denied* 792 N.E.2d 37 (Ind. 2003). "An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances." *Long v. State*, 865 N.E.2d 1031, 1036 (Ind. Ct. App. 2007), *trans. denied* 878 N.E.2d 214 (Ind. 2007).

The State laid the following foundation for E.H.'s competency:

> Q I want to talk to you a little bit about things called truth and lie . . . . [I]f something really happens and you tell about that, is that telling the truth or a lie?

A A truth.
Q If something really didn't happen and you just make it up, is that a truth or a lie?
A A lie.
Q What happens when you tell the truth?
A Um, I don't know.
Q Okay. What happens if you tell a lie?
A You get in trouble.
Q When you had to raise your right hand, do you understand that you had to raise your right hand so you would promise to tell the truth? You have to say yes or no.
A Yes.

(Tr. at 313.)

House argues his case is similar to *Russell v. State*, 540 N.E.2d 1222 (Ind. 1989). In *Russell*, a child witness asserted she knew the difference between telling the truth and lying, but she gave no audible response when asked what the difference was. E.H., however, was able to testify to the difference between the truth and a lie. She testified the truth is something that "really happens" and a lie is something that "really didn't happen and you just make it up." (Tr. at 313.)

House notes E.H. could not answer the question, "What happens when you tell the truth?" (*Id*.) This question has no clear answer, and House does not suggest what a correct answer might be. It was established that E.H. knew the difference between the truth and a lie, that she would "get in trouble" if she told a lie, and that she had promised to tell the truth. (*Id*.) Given this testimony, we cannot say the trial court abused its discretion by finding E.H. a competent witness. *See Kien*, 866 N.E.2d at 385 (child witness competent to testify where she gave an example of a lie and testified that you get in trouble if you lie).

3. Exclusion of Sandy's Testimony

House argues the trial court erred by excluding portions of the testimony of his mother, Sandy. The decision to admit or exclude evidence is within the sound discretion of the trial court, and we review that decision for abuse of discretion. *Herbert v. State*, 891 N.E.2d 67, 69 (Ind. Ct. App. 2008).

Defense counsel asked Sandy, "Can you tell me what Travis thinks of . . . when . . . he's . . . saying sexual touches?" (Tr. at 405.) The prosecutor objected on the ground that Sandy lacked personal knowledge, and the trial court sustained the objection. House argues this is something Sandy could testify to based on her observations of him throughout his life. However, the question clearly calls for Sandy to speculate about House's thoughts; such testimony is inadmissible under Evid. R. 602, which provides, "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." The trial court did not abuse its discretion by excluding this testimony.

Defense counsel also asked Sandy whether her daughter, Darcy House, has "any kind of medical condition." (Tr. at 407.) The prosecutor objected on the ground that the testimony was irrelevant. The trial court sustained the objection, and defense counsel made the following offer of proof:

> [I]f permitted . . . Sandra, my client's mother . . . would have testified that her daughter Darcy has severe psoriasis. Uh, Sandy would also have testified . . . that her father was afflicted with this disease and that it is . . . hereditary. Sandy would have further testified . . . that she and Travis were instructed to put prescription lotion all over [E.H.'s] body at each visitation.

(*Id*. at 415.)

Rhoderick testified E.H. had mild dermatitis and she would send lotion along when E.H. had visitation with House. Sandy testified E.H. "had dry skin, some of it looked psoriatic" and Rhoderick would send medicated lotion with E.H. (*Id*. at 409.) She testified E.H. had dry patches all over her body and that when she would apply lotion to E.H., she would cover "all the bases." (*Id*.) Thus, it was undisputed that E.H. had a dry skin condition that required application of lotion. Whether the condition was dermatitis or psoriasis does not appear to be relevant to House's defense, nor does the hereditary nature of psoriasis. Therefore, the trial court did not abuse its discretion by excluding the evidence. *See Lohmiller v. State*, 884 N.E.2d 903, 910 (Ind. Ct. App. 2008) (court did not err by excluding Lohmiller's proffered testimony that was not relevant to her defense).

4. Sufficiency of the Evidence

In reviewing sufficiency of evidence, we do not reweigh the evidence or assess the credibility of the witnesses. *Love v. State*, 761 N.E.2d 806, 810 (Ind. 2002). We consider the evidence most favorable to the verdict and the reasonable inferences drawn therefrom. *Id*. We will affirm if there is probative evidence from which a reasonable jury could have found the defendant guilty beyond a reasonable doubt. *Id*.

House challenges the sufficiency of the evidence on several grounds. The first is that E.H. did not adequately identify him as the perpetrator because she was unable to identify him in the courtroom:

Q . . . Do you see your dad in the courtroom today?
A I don't know.

Q Okay. Well pull your hair back from your eyes . . . can you look and see if you see your dad in the courtroom?
A Uh, I don't see him in the jury, I don't see him over here.
Q Okay. Well if you don't see him in the jury and you don't see him over here, there's another place you need to look in the courtroom.
A I don't know.
Q You don't know?
A Is it that guy?
Q Well I don't know honey, is that . . . your dad named Travis?
A I don't know. He don't look the same.
Q He doesn't look the same? Do you have . . . one dad named Travis or more than one dad named Travis?
A One dad.
Q What color of hair does your dad Travis have?
A Black.[4]
Q Black? Okay. [A]nd was he married when you would come to visit?
A Yes.
Q Who was he married to?
A Susan.

(Tr. at 330-31.)

At the conclusion of E.H.'s testimony, the court asked the following questions submitted by the jury:

> COURT: Okay. The next one is, and there's a couple parts to this. When was the last time you saw your dad?
> [E.H.]: I don't know. 2007?
> COURT: Okay. Did he look different then?
> [E.H.]: No, not really.
> COURT: And the third … one is similar to the second one … it says, how did Travis look different?
> [E.H.]: I don't know. He just look the same.

(*Id*. at 336-37.)

"[W]itnesses need not point to the defendant to establish the requisite identification." *Iseton v. State*, 472 N.E.2d 643, 646 (Ind. Ct. App. 1984). Identification

[4] The record does not reflect whether E.H. testified correctly to the color of House's hair. House does not argue her testimony was incorrect.

by name is sufficient. *Id*. at 647. "Identification testimony need not necessarily be unequivocal to sustain a conviction." *Heeter v. State*, 661 N.E.2d 612, 616 (Ind. Ct. App. 1996).

E.H. testified it was her dad named Travis who touched her and that she had only one dad named Travis. She knew he was married to Susan and identified a picture of the house where they lived. Other witnesses confirmed that House was E.H.'s biological father, that he was married to Susan, and that the picture E.H. identified was of the home where House lived when he was molesting E.H. Rhoderick testified E.H. had not seen House in eighteen months. There was sufficient evidence from which the jury could conclude House was the person E.H. claimed had touched her. *Cf. J.Y. v. State*, 816 N.E.2d 909 (Ind. Ct. App. 2004) (identification insufficient where child witness could describe her assailant only as a Caucasian teenager, used J.Y.'s name once during the trial to refer to someone else in the courtroom, and later testified her assailant was not in the courtroom), *trans. denied* 831 N.E.2d 738 (Ind. 2005).

House next argues there was insufficient evidence of penetration to support his conviction of child molesting as a Class A felony. The State alleged House committed child molesting by performing deviate sexual conduct with E.H. *See* Ind. Code § 35-42-4-3(a)(1). "Deviate sexual conduct" is "an act involving . . . the penetration of the sex organ or anus of a person by an object." Ind. Code § 35-41-1-9.

> Proof of the slightest penetration is sufficient to sustain convictions for child molesting. A conviction for child molesting will be sustained when it is apparent from the circumstances and the victim's limited vocabulary that the victim described an act which involved penetration of the sex organ. The unfamiliarity of a young victim with anatomical terms does not make

> her incompetent to testify when the facts are explained in simple or childlike language which the judge and jury can understand. Also, a detailed anatomical description of penetration is unnecessary.

Scott v. State, 771 N.E.2d 718, 724 (Ind. Ct. App. 2002) (citations omitted), *trans. denied* 783 N.E.2d 699 (Ind. 2002), *disapproved of on other grounds by Louallen v. State*, 778 N.E.2d 794 (Ind. 2002).

In *Scott*, the child victim testified Scott had put his finger in her "private" and she uses her private to "[u]se the restroom." *Id*. Scott argued this testimony implied he penetrated her urethra, and the urethra is not part of the female sex organ. We disagreed:

> In *Short [v. State]*, this court held that in determining whether an individual had engaged in sexual intercourse for the purpose of establishing the crimes of child molesting and incest, it was not necessary to prove that the vagina was penetrated. 564 N.E.2d [553, 559 (Ind. Ct. App. 1991)]. Rather, this court, relying in part upon the decisions of courts in other jurisdictions, determined that the penetration of the external genitalia was sufficient to sustain a conviction. *Id*. The female external genitalia is defined as "the vulva in the female." Stedman's Medical Dictionary 641 (25th ed. 1990). The vulva is defined as "the *external genitalia* of the female, comprised of . . . the *opening of the urethra* and of the vagina." *Id*. at 1729-30. From this definition, it is clear that the opening to the urethra is located within the anatomy of a female which is referred to as the external genitalia.

Id. at 724-25 (emphases in original). We sustained Scott's conviction of child molesting by deviate sexual conduct because there was evidence Scott penetrated the victim's external genitalia. *Id*. at 725.

Likewise, there was evidence House penetrated E.H.'s external genitalia. E.H. testified House had touched her "private" and that she pees from her private. (Tr. at 321, 323.) The prosecutor asked her if House had ever touched her on the inside of her private, and E.H. said, "Kinda." (*Id*. at 325.) The prosecutor asked her if House had

touched "the top part of your private, the middle part of your private or where," and she said he had touched the middle part. (*Id*.) This testimony was consistent with House's admission he had touched her clitoris and rubbed between her labia. As the clitoris is within the external genitalia, there was sufficient evidence of penetration. *See Scott*, 771 N.E.2d at 724-25.

House argues there was insufficient evidence he touched or fondled E.H. with intent to arouse or satisfy his or E.H.'s sexual desires to support his conviction of child molesting as a Class C felony. *See* Ind. Code § 35-42-4-3(b). "The element of intent for child molesting may be established by circumstantial evidence and inferred from the actor's conduct and the natural and usual sequence to which such conduct usually points." *Altes v. State*, 822 N.E.2d 1116, 1121 (Ind. Ct. App. 2005), *trans. denied* 831 N.E.2d 746 (Ind. 2005).

There are several touches the jury could have found as the basis for the Class C felony. House admitted giving E.H. massages and touching her bare bottom. He stated he had an "elated" or "high" feeling when he touched her bottom. (Tr. at 391.) E.H. testified House took off their clothes and House kissed her inner thigh. E.H. also testified House touched her bottom and her genitalia with his penis. House's intent may be inferred from the natural and usual sequence to which this conduct usually points. *See Neuerge v. State*, 677 N.E.2d 1043, 1049 (Ind. Ct. App. 1997) (sufficient evidence of intent where Neuerge kissed inside of child's thigh, which is near an erogenous zone), *trans. denied* 683 N.E.2d 592 (Ind. 1997); *see also Altes*, 822 N.E.2d at 1121-22

(sufficient evidence of intent where Altes gave child a massage that included rubbing the child's bottom).

Finally, House challenges E.H.'s testimony as incredibly dubious. The "incredible dubiosity" rule applies when "a sole witness presents inherently improbable testimony and there is a complete lack of circumstantial evidence." *Love*, 761 N.E.2d at 810. The rule is rarely applied and is appropriate only when the testimony is so inherently improbable or equivocal that no reasonable person could believe it. *Id*.

House argues E.H.'s testimony "is equivocal, is dubious, is contradictory, and uncertain." (Appellant's Br. at 22.) He does not cite specific portions of E.H.'s testimony, but directs us to the statement of facts section of his brief. We are aware of only one inconsistency in E.H.'s testimony: when asked to identify House, she said he looked different, but when asked by the jury how he looked different, she said he looked the same. This single inconsistency does not warrant application of the incredible dubiosity rule, however, because E.H.'s testimony was supported by other evidence, including House's admissions. *See Gray v. State*, 871 N.E.2d 408, 417 (Ind. Ct. App. 2007) (although witness's testimony contained some inconsistencies, incredible dubiosity rule did not apply because judgment was supported by circumstantial evidence), *trans. denied* 878 N.E.2d 214 (Ind. 2007). There was sufficient evidence to support House's convictions.

5. Jury Instructions

House argues the trial court erred by declining to give the jury four instructions he tendered.

> In determining whether a trial court abused its discretion by declining to give a tendered instruction, we consider the following: (1) whether the tendered instruction correctly states the law; (2) whether there was evidence presented at trial to support giving the instruction; and (3) whether the substance of the instruction was covered by other instructions that were given.

Lampkins v. State, 778 N.E.2d 1248, 1252 (Ind. 2002). Instructing the jury is within the discretion of the trial court, and we will not reverse for abuse of discretion unless the instructions as a whole mislead the jury as to the law in the case. *Carter v. State*, 766 N.E.2d 377, 382 (Ind. 2002), *reh'g denied*.

House tendered the following instructions:

(1) "The crime of child molestation has two components: an evil intent coupled with an overt act. The State must prove these beyond a reasonable doubt." (Appellant's App. at 17.)

(2) "The crime of child molestation is a two party offense requiring cooperation or submission of the child being solicited." (*Id*. at 18.)

(3) "Mere touching alone is not sufficient to constitute the crime of child molestation; rather it must be proven beyond a reasonable doubt that the act of touching was accompanied by specific intent to arouse or satisfy sexual desires." (*Id*. at 19.)

(4) "Child molestation by deviate sexual conduct must be proved by evidence that the defendant intended to engage in the conduct beyond a reasonable doubt." (*Id*. at 20.)

The fourth instruction is an incorrect statement of law. The *mens rea* for child molesting is "knowingly." *Louallen v. State*, 778 N.E.2d 794, 797 (Ind. 2002).

The second instruction was taken from *Benson v. State*, 574 N.E.2d 934, 935 (Ind. Ct. App. 1991). At issue in that case was whether evidence of solicitation was sufficient to sustain a conviction of attempted child molesting. We held that it could:

> In *Ward v. State* (1988), Ind., 528 N.E.2d 52, our Supreme Court held that certain acts of child solicitation may constitute attempted child molesting. *Id*. at 55. The Ward court adopted a three-part test for determining when a solicitation constitutes a substantial step: (1) the solicitation takes the form of urging; (2) the solicitation urges the commission of the crime at some immediate time and not in the future; and (3) the cooperation or submission of the person being solicited is an essential feature of the substantive crime. *Id*. at 54.

Id. In *Ward*, our Indiana Supreme Court stated:

> Further, the substantive crime of child molesting is a two-party offense, which requires the cooperation or submission of the child being solicited. The elements of Ind. Code § 35-42-4-3(a) are: (1) a person (2) with a child under 12 years of age (3) performs or submits (4) to sexual intercourse or deviate sexual conduct.

528 N.E.2d at 55. Presumably, our Indiana Supreme Court was addressing the fact that acts of child solicitation may secure the cooperation or submission of a victim, which in turn would assist the perpetrator in committing acts of molestation. We do not read *Ward* to hold that actual submission and cooperation are elements of child molesting, and the statute does not so require.

Although the instruction comes directly from *Benson* and *Ward*, those cases involved a different issue. "The mere fact that certain language or expression [is] used in the opinions of this Court to reach its final conclusion does not make it proper language for instructions to a jury." *Ludy v. State*, 784 N.E.2d 459, 462 (Ind. 2003) (*quoting Drollinger v. State*, 274 Ind. 5, 25, 408 N.E.2d 1228, 1241 (1980)). The trial court gave

the jury the statutory definitions of child molesting as Class A and Class C felonies. The instructions listed the elements of each offense and the findings the jury must make to return a guilty verdict. They included straightforward definitions of the offenses and their elements, and language about the cooperation or submission of the child could confuse the jury in this context. *See Ludy*, 784 N.E.2d at 462 (instructions should not use terms that may mislead or confuse the jury).

The remaining instructions paraphrase the elements of the offenses and emphasize the burden of proof. As discussed, the jury was adequately instructed on the elements of the offenses. Each of the elements instructions included the State's burden of proof, and the jury was given a separate instruction on the State's burden. The trial court did not abuse its discretion by declining to give House's tendered instructions. *See, e.g., Taylor v. State*, 879 N.E.2d 1198, 1206 (Ind. Ct. App. 2008) (finding no abuse of discretion where proffered instruction was covered by other instructions given by trial court).

6. Sentence

The trial court sentenced House to forty years on the Class A felony,[5] to be served consecutive to five years for the Class C felony.[6] The trial court found House's position of trust with E.H. to be a "very, very strong aggravator." (Tr. at 501.) The trial court also found it aggravating that House repeatedly molested E.H. The court found three mitigators: House's lack of criminal history, that there were no reports of abuse of other children, and House's strong family ties. The last two were given "limited" weight. (*Id.*

[5] "A person who commits a Class A felony shall be imprisoned for a fixed term of between twenty (20) and fifty (50) years, with the advisory sentence being thirty (30) years." Ind. Code § 35-50-2-4.
[6] "A person who commits a Class C felony shall be imprisoned for a fixed term of between two (2) and eight (8) years, with the advisory sentence being four (4) years." Ind. Code § 35-50-2-6.

at 502.) The court rejected House's age, his attainment of a GED, his history of employment, and hardship to dependents as mitigating circumstances.

House first argues "the trial court's sentencing order violates *Blakely v. Washington*[, 542 U.S. 296 (2004)]." (Appellant's Br. at 24.) Our sentencing statutes were amended effective April 25, 2005 to permit a trial court to impose any sentence within the statutory range, thus remedying the Sixth Amendment violation identified by *Blakely*. *Robertson v. State*, 871 N.E.2d 280, 283 (Ind. 2007). House committed his offenses after the new statutes took effect. (*See* Appellant's App. at 15-15(a)) (charging information). This argument is not available to House.

House also argues his sentence is inappropriate. We may revise a sentence if it is "inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B). We give deference to the trial court's decision, recognizing its special expertise in making sentencing decisions. *Barber v. State*, 863 N.E.2d 1199, 1208 (Ind. Ct. App. 2007), *trans. denied* 878 N.E.2d 208 (Ind. 2007). The defendant bears the burden of persuading us the sentence is inappropriate. *Rutherford v. State*, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007).

House argues consecutive sentences are inappropriate because the two offenses involved the same victim and "were not established . . . to have occurred at significantly different times." (Appellant's Br. at 26.) He also argues the "acts alleged are not particularly heinous as Class A felonies go." (*Id.*)

"There is no greater position of trust than that of a parent to his own young child." *Hart v. State*, 829 N.E.2d 541, 544 (Ind. Ct. App. 2005). "The basis for the gross impact

that consecutive sentences may have is the moral principle that each separate and distinct criminal act deserves a separately experienced punishment." *Id*. at 545. House took advantage of E.H.'s trust in him to molest her, and he also used his knowledge of the details of her life to attempt to deflect blame.[7] In light of the evidence of repeated molestations, we do not find House's lack of criminal history significant. House received less than the maximum sentence, although we have previously held abusing a position of trust by itself may support a maximum sentence for child molesting. *Id*. at 544. We do not find his sentence inappropriate, and we affirm the judgment of the trial court in full.

Affirmed.

NAJAM, J., and ROBB, J., concur.

[7] The record indicates E.H. previously had been sexually abused by one or more of her step-brothers. During his interview, House suggested E.H. was able to fabricate her allegations based on those experiences, and he presented similar evidence at sentencing.